



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 24, 2008

Ms. Molly Shortall
Assistant City Attorney
City of Arlington
P.O. Box 90231
Arlington, Texas 76004-3231

OR2008-03740

Dear Ms. Shortall:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 305280.

The City of Arlington (the "city") received a request for proposals submitted in response to a specified RFP. You claim that the requested information is excepted from disclosure under section 552.104 of the Government Code. You also indicate that the requested information may contain proprietary information. You state, and provide documentation showing, that you have notified The Active Network, Inc., Spanish Marketing, Inc., and Facility Vendor Network of the request and of their opportunity to submit comments to this office as to why the requested information should not be released to the requestor.¹ See Gov't Code § 552.305(d); see also Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain the applicability of exception to disclose under Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

Initially, you inform us that some of the requested information was the subject of a prior ruling of this office, issued as Open Records Letter No. 2008-00819 (2008) in which this office concluded that the city may withhold information under section 552.104 of the Government Code. You indicate that the pertinent facts and circumstances have not changed since the issuance of this ruling. Thus, the city may continue to rely on Open Records Letter No. 2008-00819 for the information that was at issue in that prior ruling and withhold it under section 552.104 of the Government Code. See Open Records Decision No. 673 (2001) (governmental body may rely on prior ruling as previous determination when (1) the records or information at issue are precisely the same records or information that were previously

¹We note that the requestor has a right of access to his own proposal.

submitted to this office pursuant to section 552.301(e)(1)(D); (2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; (3) the prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and (4) the law, facts, and circumstances on which the prior ruling was based have not changed since the issuance of the ruling). To the extent the submitted information is not the same as the information previously ruled upon, we will address your submitted arguments.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations, including where the governmental body may wish to withhold information in order to obtain more favorable offers. *See* Open Records Decision No. 592 at 8 (1991). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a bidder will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). However, section 552.104 does not except from disclosure information relating to competitive bidding situations once a contract has been executed. Open Records Decision Nos. 306 (1982), 184 (1978).

You state that the city's "evaluation committee has selected a firm and the [c]ity is currently in the process of negotiating a contract with this company." You assert that release of the information at issue prior to the execution of a contract "would hinder the negotiations process and could give an advantage to the firm who the [c]ity is currently negotiating with." Based upon your representations, we conclude that the submitted information may be withheld from the requestor under section 552.104 of the Government Code until such time as the contract has been executed and is in effect. *See* Open Records Decision No. 170 at 2 (1977) (release of bids while negotiation of proposed contract is in progress would necessarily result in an advantage to certain bidders at the expense of others and could be detrimental to the public interest in the contract under negotiation).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jordan Johnson
Assistant Attorney General
Open Records Division

JJ/jb

Ref: ID# 305280

Enc. Submitted documents

c: Mr. Bill Rhoda
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(w/o enclosures)